# APPENDIX A — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED APRIL 9, 2008

## SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-3988-05T5

D.G., Guardian Ad Litem for J.G., a Minor,

Plaintiff-Appellant,

v.

NORTH PLAINFIELD BOARD OF EDUCATION, RICHARD GRECO, Director of Pupil Services, JANE DELANEY, Supervisor, Special Education, and MARILYN BIRNBAUM, Superintendent,

Defendants-Respondents.

Argued December 5, 2007 — Decided April 9, 2008

Before Judges Parker, R.B. Coleman and Lyons.

The opinion of the court was delivered by

PARKER, J.A.D.

Plaintiff D.G., guardian ad litem for her son J.G., appeals from an order entered on March 17, 2006 denying her motion for a new trial or judgment

notwithstanding the verdict (JNOV). After careful consideration of plaintiff's arguments, we affirm.

J.G. has suffered from cerebral palsy since infancy. In June 2000, at the end of his fifth grade year, J.G.'s mother, D.G., filed a due process petition with the Department of Education (DOE), claiming that the North Plainfield Board of Education (Board) failed to comply with J.G.'s individual education plan (IEP). Subsequent to filing the administrative action, plaintiff filed a complaint in the Law Division against the Board and several individual employees, claiming that J.G. was a victim of discrimination in violation of the Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -42, the Americans With Disabilities Act (ADA), 42 *U.S.C.A.* §§ 12101 to 12213, and the Federal Civil Rights Act, 42 *U.S.C.A.* §§ 1983 and 1985.

When plaintiff filed an interlocutory appeal from the administrative action in the Law Division, the then-presiding judge of the Civil Part in Somerset County consolidated the administrative and Law Division actions "for administrative purposes pending further order of the [c]ourt." The consolidation order stayed both actions for ninety days pending the parties' pursuing voluntary mediation. The mediation was unsuccessful and the cases were subsequently consolidated "for all purposes including discovery and trial."

The Law Division matter was tried over twenty days in November and December 2005. At the close of

plaintiff's case, the trial judge dismissed one count of the complaint, which alleged intentional infliction of emotional distress. The jury decided in favor of defendants on all remaining counts.

The facts relevant to this appeal are as follows. J.G. was classified as orthopedically impaired and enrolled in Stony Brook School from kindergarten through fifth grade. The boy's grandmother, R.G., served as his in-classroom aide for the first five years of his education. A number of accommodations were made for J.G., who was wheelchair-bound, to attend classes in the two-story building. R.G. was given a key to the school elevator, a bathroom on the second floor was made handicap accessible, as was a bathroom in the nurse's office. Computers, special chairs, mats and hand-held recorders were purchased for the boy's use, and he was provided with a second set of school books to keep at home. J.G.'s teachers gave him modified assignments and extended test times. His class sizes were limited and he received preferential seating and stretch breaks.

Through the end of the third grade, J.G. received physical therapy, occupational therapy and speech therapy, plus adaptive physical education. Prior to fourth grade, however, plaintiff demanded that J.G. be provided with "conductive education," an all-encompassing therapy program, in lieu of his usual therapies, and threatened to file a due process petition if the Board did not accede to her request. The Board hired Erica Nagy, the conductive educator specified by

plaintiff, and gave her permission to work with J.G. in his classrooms, the hallways, the gym and a small therapy room at the Stony Brook School. The Board also paid for and transported J.G. to a special summer camp run by Nagy beginning the summer prior to fifth grade and every year thereafter.

In the Spring of 1999, prior to J.G.'s fifth grade year at Stony Brook, plaintiff requested that the boy not be required to take his tests in the hallway, that he receive transportation to participate in band and chorus, that he be admitted into Stony Brook's ASK program, and that he be provided with a male in-classroom aide. The principal at Stony Brook, Antoinette Plewa, allowed J.G. to participate in the ASK program, an after-school homework program designed for underachieving children, even though he did not qualify because his grades were very good. Plaintiff further requested that the male aide be permitted to attend J.G.'s conductive education summer camp so that he would be appropriately trained when school began. The Board agreed to the summer training.

Ricardo Beckford was hired as J.G.'s aide. Beckford had some experience with cerebral palsy children and had worked as an aide in the district previously. He had vacation plans over the summer, however, and was unable to attend the camp. At the beginning of the next school year, the Board authorized Nagy to exceed her contract hours to train Beckford as an additional accommodation to plaintiff.

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Initially, J.G. and Beckford got along well. After a period of time, however, J.G. complained to his mother that Beckford fell asleep in class, failed to get J.G. to the bathroom in time and failed to properly pack his school bag with his homework. J.G. also claimed that Beckford turned off the power wheelchair and yelled at him to the point where J.G. was afraid. Plaintiff contacted Principal Plewa, who spoke with Beckford and J.G.'s teachers regarding the boy's allegations.

Beckford acknowledged that he had a night job but denied falling asleep in class. He denied turning off the wheelchair but noted that he was sometimes forced to intervene because J.G. traveled too fast or crashed the chair. Beckford also acknowledged that J.G. wet himself about twice a week but explained that this occurred when the boy was socializing with friends and waited too long to use the bathroom. J.G.'s teachers denied seeing Beckford sleeping or signs of urine indicating that the boy had wet himself. After completing her investigation, Plewa concluded that most of J.G.'s allegations were unsubstantiated. She did, however, direct Beckford not to turn off the wheelchair unless the boy was in danger.

In November 1999, plaintiff and J.G. attended a meeting regarding J.G.'s allegations about Beckford. Plewa, Richard Greco, Director of Pupil Services, several of J.G.'s teachers and Jane Delaney, the Special Education Supervisor were at the meeting. When the meeting became contentious and J.G. began to cry, plaintiff wheeled him out of the room, ending the

meeting. The relationship between J.G. and Beckford continued to deteriorate after the meeting and plaintiff filed a complaint with the Division of Youth and Family Services (DYFS), alleging that Beckford physically abused the child. After investigating the incident, DYFS found that the allegation of physical abuse was not substantiated. Notwithstanding the DYFS finding, the Board decided to hire a new aide for J.G. and hired Sharon Lonergran to work with the boy for the remainder of the school year.

During the same school year, J.G. complained to plaintiff that he was being put in the hallway for every test by all of his teachers in violation of his IEP, which provided that Stony Brook would enable J.G. to take eighty percent of his tests on the computer. Ron Fisher, the Board's Director of Technology and Information Services, testified that he purchased a special laptop for J.G.'s exclusive use, but was unable to obtain the software that would permit J.G. to type answers into previously computer-scanned tests. Moreover, J.G.'s teachers adamantly denied that they put the boy in the hallway for his tests, although his math and computer teacher acknowledged having a policy of giving all students makeup tests in the hallway because there were no extra classrooms in the school.

Plaintiff continued to make numerous complaints throughout the school year, claiming that Greco responded with irritation, telling her that the boy should have been "put away" in a cerebral palsy school years ago. Greco denied ever making such a statement.

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Plaintiff removed J.G. from school on June 14, 2000, when she filed the due process petition with the DOE. Although the boy missed a total of about eighty school days during the fifth grade, Plewa ensured that his final marks were based upon the work he had completed and permitted him to graduate to the sixth grade.

In her due process petition, plaintiff complained that there was no appropriate sixth grade placement for J.G. The only sixth grade program in North Plainfield for the 1999-2000 term was in the two-story Somerset School, which was more than 100 years old, overcrowded, offered only a single bathroom on each floor and contained just one stairwell-mounted fold-out lift to enable a disabled student to get from the first to the second floor. In her due process petition, plaintiff sought to have the Board "reconfigure the school district" so that the seventh graders could attend the Somerset School while J.G. and his sixth grade classmates could use the more accessible middle school. Greco, the Director of Pupil Services, stated that plaintiff's proposal was not feasible because it would have affected over 600 children. He did, however, offer to pay J.G.'s tuition to an out-of-district school of plaintiff's choice. J.G. applied to one out-of-district school, but was not accepted.

On December 20, 1999, plaintiff toured the Somerset School with Principal Judy Grady. After the tour, plaintiff requested that the lift be replaced with one large enough to accommodate J.G.'s power wheelchair and that the second floor girls' bathroom be redesignated as a boys' bathroom and made handicap accessible.

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After plaintiff filed her due process petition in June 2000, the Board's counsel had repeated discussions with plaintiff's counsel regarding J.G.'s sixth grade placement. Plaintiff continued to maintain, through her counsel, that the Somerset School was not an appropriate placement for J.G. because it was physically inaccessible. During the summer of 2000, however, plaintiff was unavailable for discussions to resolve the problems because she took J.G. on a month-long vacation.

A meeting was scheduled for September 18, 2000, the day J.G. was expected to return to school. To prepare for the sixth grade year, Greco hired Constance Fenner to provide twenty hours of home instruction to J.G. Acceding to plaintiff's request, Greco also hired Linda Ciufo, a family friend who was residing with plaintiff and J.G., to serve as J.G.'s in-classroom aide. In the event plaintiff elected to have J.G. attend the Somerset School, Greco also hired Sherry Muenz to serve as an in-class support teacher and renewed Nagy's contract for continued conductive education.

On Friday, September 15, 2000, three days before J.G. was to begin the sixth grade, the Board's counsel and plaintiff's counsel had a conference call with the Administrative Law Judge (ALJ) hearing plaintiff's due process petition. At the direction of the ALJ, the Board's counsel sent a letter to plaintiff's counsel setting forth the available options for the sixth grade year. The letter read as follows:

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Pursuant to our discussions, we have tentatively scheduled a continuation of the IEP meeting for Monday, September 18, 2000 at 10:00 a.m. As you are aware, your client's unavailability in Poland has made it difficult to resolve the outstanding issues regarding [J.G.'s] placement for the school year.

. . . .

With respect to school on Monday, the District has determined that Somerset School is not the least restrictive environment for [J.G.] due to the inadequacy and inaccessibility of the facility. The District has arranged for home instruction to be provided for [J.G.] for ten hours per week. The home instructor, Constance Fenner, has [J.G.'s] academic materials in her possession and will be contacting your client on Saturday to make arrangements for the delivery of same and the scheduling of his home instruction. Should [J.G.] wish to participate in extra curricular activities during home instruction, please be advised that the District will provide transportation.

The last agreed-upon IEP provides for placement at the [Stonybrook] School. [J.G.] may attend school at Stonybrook. There is a special education class including fifth and sixth graders which is appropriate for [J.G.]

> pending the resolution of the outstanding issues.
>
> The District has employed Linda Ciufo, pursuant to your client's request, to serve as [J.G.'s] school aide. However, Ms. Ciufo's start date will be resolved . . . [when] the outstanding issues regarding the least restrictive environment for [J.G.] are resolved.
>
> Please contact me today regarding your intentions with respect to [J.G.] accepting home instruction or attending [Stonybrook].

Plaintiff's counsel did not raise any objections to the letter and merely stated that she would be at the meeting on September 18, 2000.

Plaintiff, however, had arranged for a large rally in support of J.G. on the morning of September 18, 2000 in front of the Somerset School. During the rally, plaintiff and J.G. were admitted to the building and plaintiff proceeded to lie down on the floor of the principal's office while shouting obscenities at various Board members who had gathered for the IEP meeting. The police had to be called to disperse the crowd and calm the situation.

No formal IEP was adopted but J.G. began attending the Somerset School for the sixth grade, using a manual wheelchair to fit into the existing lift. A schedule was prepared by which J.G. spent most of his day on the second floor, minimizing his need to use

the lift. Although the boy only had access to the girls' bathroom on the second floor, J.G.'s aides tied a no admittance ribbon to the door to ensure his privacy when he was using the facility.

In October 2000, J.G. complained to plaintiff that he was being stalked and watched by Greco, the Pupil Services Director, and Delaney, the Special Education Supervisor. According to plaintiff, J.G. was so hysterical she had to keep him home from school on October 20, 2000. Greco explained that he observed J.G. on two occasions because Nagy, J.G.'s conductive educator, had not submitted requested reports detailing the boy's current condition in compliance with the requirement that the district re-evaluate all classified students every three years. Greco testified that he simply observed the boy and Ciufo operating the lift on one day and that he returned the next day to sit in on two classes. Delaney observed J.G. on one occasion at Muenz's request but left the room quickly because she saw that the boy was becoming anxious.

In December 2000, J.G. underwent hip surgery requiring a two-month recovery period, during which the Board provided home tutoring services. When the boy returned to the hospital for an additional three-week period in January 2001, the Board provided for in-hospital tutoring.

On February 26, 2001, J.G. returned to school and almost immediately began complaining about Ciufo—the aide plaintiff specified be hired for J.G.—claiming

that she was cold and cruel, yelled at him on several occasions and used obscenities. Ciufo denied the incidents and no one was able to corroborate J.G.'s claims. Thereafter, J.G. attended school only three days a week when Nagy was available and, finally, on April 5, 2001, plaintiff removed J.G. from school and he was home tutored for the remainder of the sixth grade.

In June 2001, plaintiff toured the North Plainfield Middle School in anticipation of J.G.'s seventh and eighth grade years. She was informed that the middle school and high school, which formed one large complex, would be under construction during J.G.'s entire seventh grade year. In order to limit J.G.'s need to use the lift, all of his classes were scheduled on the first floor and a first floor classroom was converted to a science room for him. Although plaintiff admitted that J.G. had good years in the seventh and eighth grades, she nonetheless complained that his computer needs were not met during those years. The evidence indicated, however, that J.G. was re-evaluated as to his technology needs in the Fall of 2001 and the Board purchased a new laptop for him with a special expanded keyboard, a printer and a variety of specialized software. The Board also paid for many hours of computer training for J.G. and for a rental computer when the new laptop crashed.

In the ninth and tenth grades,[1] J.G. often complained that the lift broke. Douglas Boydston, the

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1. We note that J.G. has completed high school and we were advised at oral argument that he is now in college.

contractor used by the Board to repair the lift, testified that there had been problems with the lift, but his company was called promptly by the school and the repairs were made quickly. When the lift broke down in April 2004, it could not be repaired. In July 2004, however, the Board passed an emergency measure allowing for the purchase of a new lift.

J.G. continued to complain about the bathrooms, but the North Plainfield Construction Official and the architect who prepared the plans for renovation of the high school both testified that the bathrooms were ADA and code compliant. Even plaintiff's expert testified that the handicap stalls and bathroom passageways were properly sized.

In this appeal, plaintiff argues:

*POINT ONE*

JUDGE KUMPF ERRED BY SEVERING THE CASES

*POINT TWO*

THE COURT ERRED BY REFUSING TO MAKE REASONABLE ACCOMMODATIONS FOR PLAINTIFF FORCING HIM TO HAVE A CHANGE OF VENUE

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*POINT THREE*

THE COURT ERRED BY NOT GRANTING PLAINTIFF'S MOTION IN LIMINE TO DECLARE PLAINTIFF A PREVAILING PARTY WITH REGARD TO THE ACCESS ISSUES

*POINT FOUR*

JUDGE BUCHSBAUM ERRED BY ALLOWING ANTHONY SCIARILLO TO TESTIFY

*POINT FIVE*

THE COURT ERRED BY NOT ALLOWING FRANCINE A[.] GARGANO, ESQ. TO TESTIFY

*POINT SIX*

JUDGE BUCHSBAUM ERRED BY ALLOWING WENDY NG [TO] TESTIFY

*POINT SEVEN*

THE JUDGE ERRED BY DIRECTLY DISCRIMINATING AGAINST [J.G.]

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*POINT EIGHT*

JUDGE BUCHSBAUM ERRED BY CONSTANTLY INTERRUPTING, INTERJECTING AND OBJECTING TO THE TESTIMONY OF WITNESSES AND MAKING IMPROMPTU COMMENTS TO THE JURY

*POINT NINE*

THE JUDGE ERRED BY NOT ORDERING A NEW TRIAL

I

Plaintiff first contends that Judge Kumpf committed reversible error in, sua sponte, remanding the administrative portion of the previously consolidated action to the OAL on the eve of trial.

After plaintiff filed an interlocutory appeal from the administrative action in the Law Division, the parties agreed to consolidate the administrative and Law Division actions to engage in mediation.

When mediation was unsuccessful, plaintiff moved to consolidate the two actions in the Law Division for all purposes, including trial. Defendant did not object and the motion was granted on March 2, 2004.

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On June 22, 2005, defendants moved before Judge Kumpf for summary judgment with respect to plaintiff's interlocutory appeal in the administrative action. On August 1, 2005, Judge Kumpf denied this motion, but sua sponte remanded the bulk of the administrative action back to the Office of Administrative Law (OAL) based upon his finding that there was no jury question presented given the lack of an administrative determination to review.

Plaintiff argues that there are numerous forums in which to litigate special education cases: the OAL, Superior Court or Federal District Court. In that statement she is correct—but each forum has jurisdiction over certain matters and may be precluded from hearing others. Each administrative agency is vested with authority to adjudicate legal rights and duties of specific parties arising under the rules and regulations promulgated by the agency. *N.J.S.A.* 52:14B-2(b) and (c); *J.E. on Behalf of G.E. v. State Dept. of Human Servs., Div. of Devel. Disabil.*, 131 *N.J.* 552, 622 *A.*2d 227 (1993). Judicial review of administrative actions is vested in the Appellate Division, *R.* 2:2-3(a)(2), and is severely limited. *In re Musick*, 143 *N.J.* 206, 216, 670 *A.*2d 11 (1996) (citing *Gloucester County Welfare Bd. v. N.J. Civil Serv. Comm'n*, 93 *N.J.* 384, 390, 461 *A.*2d 575 (1993)). The judiciary may intervene only in "rare circumstances in which an agency action is clearly inconsistent with its statutory mission or other state policy." *Ibid.* We are bound to "defer to an agency's expertise and superior knowledge of a particular field." *Greenwood v. State Police Training Ctr.*, 127 *N.J.* 500,

513, 606 *A.*2d 336 (1992). Moreover, our scope of review of an agency's action is limited to determining whether there is sufficient credible evidence in the record to support the agency's decision or action. *Clowes v. Terminix Int'l, Inc.*, 109 *N.J.* 575, 588, 538 *A.*2d 794 (1988).

We have carefully considered plaintiff's arguments on this point and we are convinced that they lack sufficient merit to warrant lengthy discussion. *R.* 2:11-3(e)(1)(E). Suffice it to say that the Law Division lacked jurisdiction from the outset to hear an appeal from an administrative agency. *R.* 2:2-3(a)(2); *In re Senior Appeals Examiners*, 60 *N.J.* 356, 363, 290 *A.*2d 129 (1972); *In re Grievance of Trans. Emp.*, 120 *N.J.Super.* 540, 295 *A.*2d 369 (App.Div.1972), *certif. denied*, 62 *N.J.* 193, 299 *A.*2d 727 (1973). Since the Law Division lacked jurisdiction to hear the interlocutory administrative appeal in the first instance and the DOE, through the OAL, was vested with authority to hear plaintiff's due process petition respecting the IEP, the cases should not have been consolidated after the unsuccessful mediation; there was no error in Judge Kumpf's order remanding it. *N.J.S.A.* 52:14B-1 to -24; *see, e.g., Infinity Broadcasting Corp. v. N.J. Meadowlands Com'n*, 187 *N.J.* 212, 223, 901 *A.*2d 312 (2006); *Pascucci v. Vagott*, 71 *N.J.* 40, 53, 362 *A.*2d 566 (1976).

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II

Plaintiff next contends that she was denied a fair trial in the Law Division as a result of the change in venue from Somerset to Hunterdon County pursuant to plaintiff's own motion.

On August 18, 2005, shortly before the trial was originally scheduled to begin in Somerset County, plaintiff requested that the case be tried in the new Somerset County Courthouse because J.G.'s wheelchair could not fit into the witness box in the courtroom to which they had been assigned in the old courthouse. Plaintiff insisted that it was "extremely important that [J.G.] testify from the same witness area that other individuals testify from." Plaintiff further requested that a ramp to the witness box be installed in the new courtroom. Plaintiff was advised that the new courthouse did not have wheelchair-accessible witness boxes and that there was no ramp available to be installed. She then moved for a change of venue, arguing that "[a] reasonable accommodation would be to provide plaintiff with a fully accessible courtroom which is located a short distance away in Hunterdon County." Plaintiff's motion was granted and the matter was transferred to a fully ADA-accessible courtroom in Hunterdon County.

Plaintiff argues that her request for accommodations to allow J.G. access to the Somerset County Courthouse and its witness boxes should have been granted because the perceived problems could have been "easily rectified." There is nothing in the

record, however, indicating that plaintiff ever requested that a witness box be placed on the ground level of the courtroom so that everyone could testify from there. Nor, did she present any evidence to support her contention that J.G. would have been prejudiced by testifying from the well of the courtroom rather than the jury box.

Plaintiff next contends that she was prejudiced by the change in venue because: (1) the jurors in Hunterdon County were likely displeased that their tax dollars had to be used to accommodate J.G.; (2) the jurors were possibly influenced as to the merits of the case by the fact that Somerset County had not deemed it necessary to accommodate J.G. with his courtroom requests; (3) the jurors in Hunterdon County likely did not care about possible discrimination by a school district in Somerset County; (4) the Hunterdon County jurors possibly possessed attitudes unique to Hunterdon County as a result of that county's different economic and social makeup; and (5) her attorneys lost valuable preparation time by being forced to drive an additional forty-five minutes each way to trial.

Plaintiff has presented no evidence to support her contentions impugning the impartiality and diligence of the Hunterdon County jurors. Her arguments on those points are speculative and do a disservice to the jurors who gave their time and attention through twenty days of trial. Moreover, plaintiff has identified no deficiency in the performance of her attorneys as a result of the increased travel time. A litigant is entitled to a fair trial,

not a perfect one. *State v. Biddle*, 150 *N.J.Super.* 180, 183, 375 *A.*2d 283 (App.Div.1977). The trial was transferred to Hunterdon County at plaintiff's request. She cannot now complain that the Hunterdon jurors were less sympathetic to her cause or that the travel time was too great a burden. *Regents of the Mercersburg College v. Rep. Franklin Ins. Co.*, 458 *F.*3d 159 (3d Cir.2006); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 *U.S.* 356, 121 *S.Ct.* 955, 148 *L.Ed.*2d 866 (2001).

III

Plaintiff next contends that the trial court committed reversible error in denying her pretrial motion to be declared a prevailing party as to the high school access issues.

Prior to trial, plaintiff moved in limine to be declared a prevailing party under the LAD and the ADA, entitling her to damages and counsel fees. Specifically, she argued that after she filed the lawsuit and presented defendants with an expert report detailing the deficiencies in the high school, defendants complied with their statutory obligations by replacing one lift, ordering another and designating an existing female faculty bathroom as a "unisex" bathroom available to J.G. Relying upon *Warrington v. Village Supermarkets*, 328 *N.J.Super.* 410, 746 *A.*2d 61 (App.Div.2000), plaintiff insists that she had demonstrated the requisite nominal success on her claims.

At a hearing on plaintiff's motion, defendants argued that, contrary to the opinion of plaintiff's expert, the high school was already statutorily compliant prior to the filing of plaintiff's complaint. Defendants demonstrated that the lift was replaced, not because of the expert report, but because it was irreparably broken. They further demonstrated that a handicap-accessible boys' bathroom was always available to J.G. at the high school and the women's faculty bathroom was simply set up as an alternative since J.G. had female aides.

In ruling on plaintiff's motion, the trial court initially observed that it would be premature to declare a prevailing party since defendants continued to maintain that the high school was always statutorily compliant and that the at-issue changes had been made for other legitimate reasons. In the court's view, the position taken by defendants left all issues in the case for the jury to resolve. We agree.

Plaintiff argues that she should have been declared a prevailing party prior to trial because her lawsuit served as the "catalyst" that prompted the changes. Her argument fails in the face of *Buckhannon Bd. & Home Care v. W.Va. Dep't of Health & Human Res.*, 532 *U.S.* 598, 605, 121 *S.Ct.* 1835, 1840, 149 *L.Ed.*2d 855, 863 (2001), in which the United States Supreme Court held that the "catalyst" theory was not a permissible basis for the award of attorney fees under several federal statutes, including the ADA, and that fees could only be awarded under that statute where there was a

judgment on the merits or a settlement agreement enforced through a consent decree. In *Baer v. Klagholz*, 346 *N.J.Super.* 79, 82-83, 786 *A.*2d 907 (App.Div.2001), *certif. denied*, 174 *N.J.* 193, 803 *A.*2d 1165 (2002), we held that *Buckhannon* was binding in New Jersey when the counsel fee provisions of federal statutes were at issue.

IV

Plaintiff contends that the trial court committed plain error in admitting the testimony of Anthony Sciarrillo, the Board's counsel, because he was not on defendants' witness list.

On the sixth day of trial, plaintiff sought to admit into evidence Sciarrillo's September 15, 2000 letter to plaintiff's counsel regarding the arrangements for J.G.'s sixth grade placement. Defendants immediately objected but the trial court tentatively ruled that the letter was admissible as an admission by an authorized representative. In light of that ruling, defendants then requested that Sciarrillo be permitted to testify as to the meaning of the letter. Plaintiff made no objection to this request and the court agreed that, if the letter went in, this would be an appropriate way to deal with the matter.

Sciarrillo testified that he had repeated discussions with plaintiff's counsel regarding J.G.'s sixth grade placement over the summer of 2000. He noted that, although the only place for regular sixth grade classes

was in the Somerset School, plaintiff's counsel maintained that the Somerset School was physically inaccessible for J.G. Although both counsel participated in an IEP meeting on July 19, 2000, during which the Somerset School placement was offered, plaintiff's counsel continued to voice concerns and nothing was resolved. Neither plaintiff's counsel nor plaintiff made themselves available for followup meetings before the beginning of the 2000 school year.

Sciarrillo further testified that on September 15, 2000, he and plaintiff's counsel conferred with the ALJ hearing plaintiff's administrative petition. Sciarrillo advised that, although defendants were offering placement at the Somerset School, an IEP had not been finalized because of plaintiff's concerns. The ALJ directed Sciarrillo to send a letter to plaintiff's counsel setting forth the available options under the circumstances. That same day, Sciarrillo faxed the letter to plaintiff's counsel offering placement in Stony Brook School supplemented by home instruction. The letter expressly noted that the placement was being offered "pending the resolution of the outstanding issues," and included an addendum directed to the ALJ indicating that the letter merely outlined the "current" status of the matter.

"Ordinarily unnamed witnesses should be permitted to testify where the failure to supply their names in discovery was not the result of a design to mislead and where there was no surprise or prejudice to the opposing party if the testimony were to be allowed."

*Brown v. Mortimer*, 100 *N.J.Super.* 395, 401, 242 *A.*2d 36 (App.Div.1968). We find no error in the trial court's admission of Sciarrillo's testimony. Plaintiff opened the door by offering the September 15, 2000 letter into evidence and cannot now claim that she was prejudiced by Sciarrillo's testimony. *R.* 2:10-2. The trial court properly allowed Sciarrillo's testimony. *Brown, supra*, 100 *N.J.Super.* at 401, 242 *A.*2d 36; *Casino Reinvestment Dev. Auth. v. Lustgarten*, 332 *N.J.Super.* 472, 497, 753 *A.*2d 1190 (App.Div.) *certif. denied*, 165 *N.J.* 607, 762 *A.*2d 221 (2000).

V

Plaintiff contends that the trial court committed reversible error in precluding testimony from one of her attorneys, Francine Gargano.

Prior to trial, defendants objected to Gargano being named as a potential witness. The court noted that, under *R.P.C.* 3.7, Gargano could not appear as counsel *and* be a witness. Plaintiff argued that if Gargano were called, it would only be on rebuttal. The court, however, reiterated that if Gargano participated in the trial, she would be precluded from testifying, unless a "surprise" situation involving "some unusual circumstances" occurred.

Gargano chose to continue as trial counsel and participated extensively in the trial. At the conclusion of defendants' case, plaintiff stated there would be no rebuttal testimony, thereby waiving any claims that

Gargano should have been permitted to testify as a rebuttal witness. Plaintiff has not demonstrated any prejudice resulting from the court's ruling on this issue. *R.* 2:10-2. Consequently, we find no merit in this argument. *R.* 2:11-3(e)(1)(E).

VI

Plaintiff contends that the trial court committed reversible error in admitting the testimony of Wendy Ng, a special education teacher at the high school, because she was not on defendant's witness list.

Early in the trial, J.G. testified on direct as follows:

> [Plaintiff's counsel]: What bathroom did you go use in the fourth grade, the boy's room or the girls' room?
>
> [J.G.]: The girls' room.
>
> [Plaintiff's counsel]: What bathroom did you use in fifth grade?
>
> [J.G.]: The girls' room.
>
> [Plaintiff's counsel]: What bathroom did you use in sixth grade?
>
> [J.G.]: The girls' room.
>
> . . . .

[Plaintiff's counsel]: In seventh grade, [J.G.], did you use the girls' room or the boys' room?

[J.G.]: Thank God I used the boys' room.

[Plaintiff's counsel]: And eighth grade?

[J.G.]: Thank God I used the boys' room . . .

[Plaintiff's counsel]: Ninth and tenth grade?

[J.G.]: Ninth grade I still used the boys' room, tenth grade unfortunately I am back to using the womens' faculty bathroom.

The following day, defendants advised the court that they intended to present Ng's testimony to rebut J.G.'s testimony regarding his tenth-grade bathroom usage. Noting that plaintiff could still depose Ng, the trial court indicated that it was "comfortable" with allowing Ng's testimony over plaintiff's objection. Ng subsequently testified that she observed J.G., as a tenth grader, using the boys' bathroom in the high school cafeteria several times each week.

We have carefully considered the record in light of plaintiff's arguments on this issue and we find no abuse of the trial court's broad discretion in admitting this rebuttal evidence. *Lustgarten, supra,* 332 *N.J.Super.* at 497, 753 *A.*2d 1190. Ng's testimony was limited, not cumulative or repetitive. Plaintiff was able to cross-examine Ng as to her observations and the fact that she learned of J.G.'s testimony from a newspaper article.

*Appendix A*

VII

Plaintiff contends that she was denied a fair trial because the trial judge discriminated against [J.G.].

Immediately after his opening statement, outside of the presence of the jury, defense counsel made an application that resulted in the following colloquy:

> [Defense counsel]: Regretfully I must bring this motion—or this application. I am going to ask the Judge to direct the plaintiff not to make noises, laugh, giggle, and everything else during my presentation of the case. It was pretty obvious to me that it was being done. And I recognize that [J.G.] has some disabilities and may not be able to control all of his emotions, but if he can't do it, I am going to ask that he be removed from the court because it's distracting to the jury. He'd laugh, the jury would look at him while I was giving my opening. And it's . . . I hate to say disrespectful but it is disrespectful.
>
> THE COURT: I think there are two issues. Number one, was the jury distracted. I know I noticed it but I had a more direct view of [J.G.] maybe than the jury, and was it . . . distracting[,] I doubt it.

> But the second issue is should it go on just as a matter of decorum in the courtroom. And it does appear to me observing the situation that there were a lot more reactions to [defense counsel's] opening than there were to [plaintiff's counsel's]. So I share some of his concern. We all, I think—I have watched both . . . [plaintiff and plaintiff's counsel] attempt to deal with the situation, but really it has to be equal. Whatever [J.G.'s] feelings about the case . . . he can express them no more than any of you could, counsel, or any other witness.
>
> . . . .
>
> I don't see any need from what I have heard at this point to contemplate excluding, it would be a very drastic step. But if he is the good student everyone agrees he is, and he is as perceptive as I am hearing the testimony he is, he should be able to deal with the situation and keep his feelings in check just as . . . any witness or any party would do.
>
> So I am going to direct that that be done.

Plaintiff's counsel represented that J.G.'s reactive behavior was not deliberate but was caused by his cerebral palsy. The court pointed out, however, that J.G. had not been reactive during the initial jury instruction nor during plaintiff's counsel's opening. The court

stated that it had to ensure that the trial was fair to both sides and encouraged plaintiff's counsel to address the matter with J.G. over the lunch break.

Plaintiff now argues that the trial court erred by "going along with" defense counsel's initial application regarding J.G.'s in-court behavior. We find nothing in the record to support that argument.

Later that day, at sidebar, the trial judge asked counsel whether the jury should be told to advise the court if they found J.G. "doing something that distracts them." The judge specifically stated that he did not want the jury "to focus on [J.G.] as being some kind of very different person" but, "[i]f he is the way he is, it is the way he is, we can't change that." Counsel agreed to collaborate on an appropriate instruction, if needed, and the matter was dropped for the moment. Plaintiff stated that she would bring a doctor's note explaining the effects of J.G.'s cerebral palsy on his behavior. The note was never provided, however.

The next day, while plaintiff was on the witness stand, defense counsel objected to plaintiff's hearsay testimony and the court called counsel to sidebar. While counsel and the court were involved at sidebar, J.G. began crying and left the courtroom. Plaintiff's counsel noted during sidebar that the jury had witnessed his behavior and requested that something be said. After some discussion, plaintiff's counsel agreed that an instruction was not necessary at that point. Nevertheless, the trial judge told counsel that he would

take direction from them as to when to intervene and what to say. Counsel agreed. The judge stated, "[s]omehow or other we are going to have a fair trial here with respect to this young man."

The trial proceeded thereafter, largely without incident. During his testimony, J.G. explained that he has more difficulty controlling his body if he is upset or nervous, resulting in unexpected movements. Later, the trial court interrupted the testimony of Board member Mary Elizabeth O'Connor regarding accessibility of the bathrooms and addressed the jury as follows:

> Let's just hold for a minute here. Let's-all right. I will just note for the record that there was apparently an incident of discomfort on the part of the Plaintiff, [J.G.]. Of course, the jury is not to draw any inference one way or another as to why that might have occurred, or any inference about the case from that situation.

There is no indication in the record as to what triggered the court's comment. Notably, plaintiff's counsel did not object to this instruction. Plaintiff now argues, however, that the trial judge committed reversible error by pointing out J.G.'s behavior, which plaintiff alleges the court did solely to frighten and humiliate J.G.

Plaintiff further insists that the trial judge improperly made "constant" comments to the jury about J.G.'s discomfort, thereby discriminating against him.

*Appendix A*

We have carefully reviewed the extensive trial record and we find nothing to support that claim. Rather, the record reflects only the one instance noted above when the court made a sua sponte comment to the jury and plaintiff's counsel failed to object. When the court raised the question of J.G.'s discomfort at sidebar, the court's obvious goal was to solicit counsels' thoughts on the best way to handle any developing situation. Nothing in the record leads us to conclude that the trial court discriminated against J.G.

VIII

Plaintiff further contends that she was denied a fair trial as a result of improper judicial interference. A judge must "conduct [a] trial in a fair and impartial manner, without making remarks that might prejudice a party or which are calculated to influence the minds of the jury." *Cestero v. Ferrara*, 110 *N.J.Super.* 264, 273, 265 *A.*2d 387 (App.Div.1970), *aff'd*, 57 *N.J.* 497, 273 *A.*2d 761 (1971). A judge should never unfairly criticize or humiliate counsel, especially in front of the jury. *Mercer v. Weyerhaeuser Co., supra*, 324 *N.J.Super.* at 298, 735 *A.*2d 576. A judge's failure to abide by these guidelines "can easily prejudice a jury since it conveys the opinion of the judge as to his [or her] belief or disbelief in one side of the case." *State v. Zwillman*, 112 *N.J.Super.* 6, 21, 270 *A.*2d 284 (App.Div.1970), *certif. denied*, 57 *N.J.* 603, 274 *A.*2d 56 (1971). Nevertheless, a trial court has wide discretion in controlling the courtroom and the court proceedings. *Ryslik v. Krass*, 279 *N.J.Super.* 293, 297, 652 *A.*2d 767 (App.Div.1995). Alleged misconduct

by a trial judge must be reviewed within the context of the entire record in order to determine whether it had prejudicial impact. *Mercer v. Weyerhaeuser Co.*, 324 *N.J.Super.* 290, 298, 735 *A.*2d 576 (App.Div.1999)

We have carefully reviewed the extensive record of this lengthy trial, along with the pre- and post-trial proceedings, and we find no evidence to support plaintiff's numerous claims of prejudicial conduct by the trial court. Indeed, we are impressed with Judge Peter Buchsbaum's efforts to ensure that both parties had a level playing field and a fair trial. Judge Buchsbaum exercised great patience during this lengthy, difficult and sensitive trial. He conducted the proceedings well within the bounds of judicial conduct.

IX

Finally, plaintiff argues that the trial court erred in denying her motion for a new trial based on the weight of the evidence. *Rule* 4:49-1(a) provides that a trial court must grant a motion for a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly appears that there was a miscarriage of justice under the law." *Dolson v. Anastasia*, 55 *N.J.* 2, 7, 258 *A.*2d 706 (1969). We must adhere to essentially the same standard when reviewing a trial court's action on a motion for a new trial. We must give deference to the trial court's feel of the case as to matters such as the demeanor and credibility of witnesses, but otherwise we conduct an independent review of the record to determine the fairness of the

result. *Carrino v. Novotny*, 78 *N.J.* 355, 360-61, 396 *A.*2d 561 (1979); *Baxter v. Fairmont Food Co.*, 74 *N.J.* 588, 597-98, 379 *A.*2d 225 (1977). "An appellate court may overturn a jury verdict 'only if [that] verdict is so far contrary to the weight of the evidence as to give rise to the inescapable conclusion of mistake, passion, prejudice or partiality.' " *Kassick v. Milwaukee Elec. Tool Corp.*, 120 *N.J.* 130, 134, 576 *A.*2d 270 (1990) (quoting *Wytupeck v. City of Camden*, 25 *N.J.* 450, 466, 136 *A.*2d 887 (1957)); *accord JMB Enterprises v. Atl. Employers Ins. Co.*, 228 *N.J.Super.* 610, 616, 550 *A.*2d 764 (App.Div.1988).

In her new trial motion, plaintiff argued that the jury's verdict was plainly erroneous since Sciarrillo's September 15, 2000 letter was an admission by defendants that the Somerset School was not ADA compliant. She further claimed that the record was clear that no effort had been made at Somerset School to accommodate J.G.'s bathroom needs or his power wheelchair and that J.G. was blatantly discriminated against when he was deemed an impediment in the hallways.

In its decision denying plaintiff's motion, the trial court initially observed that each "fact" plaintiff continued to allege as indicative of discrimination, was subjected to a great deal of "cross testimony [and] countervailing facts." The court observed that the jury's assessment of the credibility of plaintiff and J.G. might have been affected by their testimony. The court noted that there was "a great difference in the way [plaintiff and J.G.] responded to questions in direct

[testimony], with a great deal of animation," contrasted with the "frequent 'I don't knows' or 'I don't remembers' on cross." The court noted that J.G.'s testimony that he didn't remember certain things could have led the jury to conclude "that some of the incidents were not as severe as he might have posed them." The court further noted that plaintiff's credibility was also likely affected by her claim that she had no idea there was going to be a demonstration on September 18, 2000, which was wholly belied by her extraordinary behavior on that date.

Moreover, the court was not persuaded that Sciarrillo's letter of September 15, 2000 was conclusive proof of discrimination. The court noted initially that the letter "was a serious piece of evidence in favor of the plaintiff. . . . Viewed in isolation, [it] basically says: Stay out of our school." When viewed in the context of what was happening at the time, however, the letter had a different import and "[t]he jury was entitled to believe that there was some kind of miscommunication or some kind of direction that was involved in that letter going out at the time it did with respect to . . . what counsel thought his obligations were to the administrative law judge." The court concluded that taken in context, the September 15 letter was not conclusive proof of discrimination. We agree.

Our review of the twenty-day trial record has convinced us that the verdict was more than adequately supported by the evidence and there was no miscarriage of justice. *R.* 4:49-1(a); *Dolson, supra,* 55 *N.J.* at 6, 258 *A.*2d 706.

Affirmed.

## APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, SOMERSET COUNTY, LAW DIVISION DATED JUNE 22, 2005

### STATEMENT OF REASONS

SUPERIOR COURT OF NEW JERSEY
SOMERSET COUNTY
LAW DIVISION
HONORABLE FRED H. KUMPF, J.S.C.
RETURN DATE: July 22, 2005
DOCKET NO.: SOM-L-990-01
(consolidated with SOM-L-860-01)

*GARGANO V. NORTH PLAINFIELD BOARD OF EDUCATION, et. al.*

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

MOVANT: DEFENDANT NORTH PLAINFIELD BOARD OF EDUCATION, et. al. ATTORNEY: JOHN H. SCHMIDT, ESQ.

OPPONENT: PLAINTIFF DENISE GARGANO, GUARDIAN AD LITEM FOR A.J.G. A MINOR ATTORNEY: RICHARD FLAUM, ESQ. and FRANCINE GARGANO, ESQ.

ORAL ARGUMENT: YES

*Appendix B*

## COURT'S OPINION

Defendant filed this motion on June 22, 2005 seeking summary judgment on the interlocutory appeal of rulings on motions by the administrative law judge in the due process petition filed with the New Jersey Department of Education alleging violations of the Individuals with Disabilities Education Act, (IDEA), 20 *U.S.C.A.* §1415(1)(l)(E), in docket number SOM-L-860-01. Plaintiff filed opposition on July 14, 2005. There is a trial date scheduled in this case for August 15, 2005.

This action is on behalf of A.J.G. a classified student who attends North Plainfield High School. A.J.G. is confined to a wheelchair as a result of a physical handicap suffered at birth. On or about June 15, 2000, Plaintiffs filed a due process petition with the New Jersey Department of Education alleging violations of the IDEA relative to the special education and related services provided to A.J.G. by Defendant. The filing of that petition resulted in an administrative law proceeding being initiated before the Office of Administrative Law. The allegations in the administrative action related to plaintiff's attendance in fifth grade in the Stony Brook school during the 1999 to 2000 academic school year and with the qualifications of the staff working with A.J.G. and the quality of the assistive technology provided to A.J.G. in violation of the Individual Education Program (I.E.P.) for A.J.G. and provisions of related services and accommodations by the teaching staff. The administrative action also sought placement for the 2000 academic school year with plaintiff seeking, according

to Defendant, to "reconfigure the school district by moving elementary school and middle school." Prior to the hearing a number of motions were made by Plaintiff to exclude the testimony of the school psychologist on the basis of that the information was privileged under *N.J.R.E.* 505 and to exclude witnesses for defendant from the hearing, which motions were denied by the Administrative Law Judge hearing the matter. Plaintiff moved for interlocutory appeal of the denial of these motions and for a stay of the administrative hearing to the Superior Court Law Division. By order dated June 7, 2001, the Honorable Helen Hoens, P.J.S.C. granted leave to appeal and issued a stay of the administrative action pending the appeal. The order also set up a status conference and Judge Hoens decided that the interlocutory appeal of the administrative action under docket number SOM-L-860-01 should be heard with the complaint for violation of the Laws Against Discrimination (LAD), which was to be filed.

On June 28, 2001, Plaintiff filed an action in the Superior Court under docket number SOM-L-990-01. In the complaint, Plaintiffs alleged violations of the ADA, Section 504 of the Rehabilitation Act, 29 *U.S.C.A.* §701, et seq. and the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1, et seq. Plaintiffs seek to have the Somerset School, the North Plainfield Board of Education (NPBOE) Middle School and the NPBOE High School made Americans with Disabilities Act (ADA) and New Jersey Handicap Access Law (NJHAL) compliant. On March 2, 2004, an order was entered by the Honorable Frank W. Gasiorowski, J.S.C.,

consolidating the complaint with docket number SOM-L-860-01 with the complaint with docket number SOM-L-990-01 for all purposes including discovery and trial.

**DEFENDANT CONTENDS**

Defendant contends that Plaintiff should be barred from pursuing claims filed in the administrative action because he failed to exhaust his administrative remedies. Defendant contends that the IDEA requires an aggrieved party to invoke a state's administrative procedure prior to instituting a claim in state or federal court. Defendant contends that Plaintiff is also ban-red from circumventing the IDEA's exhaustion by taking claims that could have been brought under the IDEA and repackaging them as claims under some other statute. Defendant contends that in this case Plaintiff filed a due process petition alleging that the District did not provide him with a free, appropriate public education under the IDEA. Defendant contends that Plaintiff did not pursue this administrative process to its conclusion. Defendant contends that Plaintiff is then barred from pursuing these claims in this Court as he failed to exhaust his administrative remedies.

Defendant contends that Plaintiff's claims relating to Stony Brook School, Somerset School, and the Middle School must be dismissed as moot. Defendant contends that Plaintiff has not attended school in these buildings for years and will not attend them again. Defendant contends that Plaintiff graduated from Stony Brook School in June 2000 and there is no case or controversy

regarding Stony Brook School and the services provided there. Defendant contends further that Plaintiff ceased attending Somerset School four years ago and the Middle School two years ago and that Plaintiff will never be in the position to require the services, or utilize the facilities, of Somerset School or the Middle School.

**PLAINTIFF'S OPPOSITION**

Plaintiff first contends that they should not be barred from pursuing claims filed in the administrative action as the administrative action was stayed pending this action in the Superior Court and because Plaintiff did not fail to exhaust his administrative remedies. Plaintiff contends that the Defendants consented to these matters being consolidated and cannot argue now that consolidation was improper. Plaintiff contends that Defendants are precluded from now arguing that this matter is barred because Plaintiff failed to exhaust his administrative remedies. Plaintiff contends that they did not ignore the OAL and file in Superior Court. Plaintiff contends that the court, all litigants and all of their attorneys saw fit to consolidate these cases in the Superior Court.

Plaintiff next contends that the claims against Stony Brook School, Somerset School and the Middle School are not moot. Plaintiff contends that the mere fact that the Plaintiff no longer attends these schools does not mean that the schools noncompliance with the ADA and the NJHAL are moot. Plaintiff contends further that it does not mean Plaintiff has not suffered damages while attending those schools.

*Appendix B*

**DISCUSSION**

Defendant moves for summary judgment on the issue that the Plaintiff's should be barred from pursuing claims filed in the administrative action because he failed to exhaust his administrative remedies. Defendant contends that the IDEA requires an aggrieved party to invoke a state's administrative procedure prior to instituting a claim in state or federal court. 20 *U.S.CA.* §1415(e)(2). Section 1415(f) of the IDEA provides that before bringing claims under other statutes that "seek relief that is also available under this subchapter," the administrative procedures set forth in §1415 "shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 *U.S.C.A.* §1415(f).

A.J.G. is a child with disabilities as defined in the Individuals with Disabilities Education Act. 20 *U.S.C* . § 1401(a)(1)(A). The State of New Jersey does receive financial assistance from the United States Federal Government which is made available through IDEA. *20 U.S.C* § 1400-1415. Consequently, the defendant is subject to the provisions of the IDEA and is required to provide a free appropriate public education as defined in 20 *U.S.C.* § 1401(a)(18) to all children with disabilities. The stated purpose of the IDEA is to assure that all handicap children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to ensure the rights of handicap children and their parents or guardians are protected,

to assist states and localities to provide education of all handicap children and to assess and assure the effectiveness of efforts to educate handicap children. 20 *U.S.C.* § 1400(c); *Whitehead v. School Board for Hillsborough County, Florida*, 918 *F. Supp.* 515, 517-518 (M.D. Fla. 1996). Under the IDEA, any state or local agency receiving assistance must establish and maintain "procedural safeguards" for implementing the IDEA. 20 *U.S.C.* § 1415(a). These procedures include not only the right of the parents to participate in the development of the "Individual Education Program" (IEP), but also the requirement that parents be given an opportunity to contest any matter that relates to the provision of a "free appropriate education" for their child. 20 *U.S.C.* § 1415(b). If the parents of a handicapped child decide to bring a complaint they must be given "an impartial due process hearing." 20 U.S.C. § 1415(b). On completion of the administrative process, "any party aggrieved by the findings and decisions . . . shall have the right to bring a civil action with respect to the complaint" in either state or Federal court which shall, "receive the records of the administrative proceedings . . . and basing its decision on the preponderance of the evidence shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). In *Anderson v. Thompson*, 658 *F.2nd* 1205, 1208-11 (7th Circuit 1981) the court indicated that under the IDEA the phrase "all appropriate relief' allowed the courts to "adopt the program offered by the school district or the program advocated by the parents, or that it could . . . devise any program which in its view would ensure an appropriate individualized educational program". In *Anderson*,

*supra*, 658 *F.2nd* at 1211-12 the court made it clear, however, that the language does not permit the filing of an educational malpractice action and that damages are not generally available as a remedy under the IDEA. *Anderson, supra*, 658 *F.2nd* at 1208-1211; *see Minor v. Missouri*, 673 *F.2nd* 969, 979 (8th Circuit 1982) (holding that "appropriate relief" was "generally intended to be restricted to injunctive relief, within which the judge would have wide latitude to fashion an individualized education program for the child." Damages were permitted only under exceptional circumstances, (1) where the school district's placement of the child would endanger the child's physical health, and (2) where the school district "acted in bad faith by failing to comply with the procedural provisions of IDEA in an egregious fashion" *Anderson, supra*, 658 *F.2nd* at 1213-1214; *see also Whitehead v. School Board of Hillsborough County, State of Florida, supra*, 918 *F. Supp.* at 516-519. Hence, as stated by the District Court in *Whitehead* "the explicit purpose of IDEA is to assure the establishment of appropriate public educational opportunities for handicap children, and not to serve as a source from which individuals may collect tort-type damages. The proper remedy for violation of IDEA is to implement an appropriate educational plan for the child and compensate parents for providing services that the child should have that the school should have provided. 20 *U.S.C.* Section 1400(c); Whitehead Supra 918 Fed. Sup at 1520. The relief required under the IDEA requires that there be administrative determinations for the court to review. There is support for defendant's argument that failing to have

administrative determination which the court can review would warrant the granting of partial summary judgment and dismissing so much of that complaint as alleges a failure to comply with the IDEA. See Whitehead v. School Board of Hillsborough County, State of Florida, 932 *F. Supp* 1393, 1396 (M.D. Fla. 1996).

The IDEA does appear to require an aggrieved party to exhaust his administrative remedies, as a prerequisite to the courts review of the administrative law judge findings and the determination by the Commissioner of Education of the IEP for the child. The facts in this case do not suggest that this is a situation where a plaintiff has attempted to abandon his administrative claim by filing in the Superior Court. The procedural history in this case shows that the administrative action was stayed pending the resolution of the matter in the Superior Court. The Defendant at no time during the four year history of the case prior to this motion, sought to lift that stay and proceed with the administrative determination. In fact, the procedural history shows that in this case Plaintiff sought administrative action initially. The appeal of the initial rulings on motions by the OAL and the action in the Superior Court were eventually consolidated in an order dated March 2, 2004 for all purposes including discovery and trial and not just for administrative purposes as the Defendant suggests. The Defendant waited until the eve of trial scheduled for August 16, 2005 to file this motion for partial summary judgment. This is not a case where the Plaintiff has abandoned his administrative claims and failed to exhaust his remedies; but rather a case where for the parties and for the courts convenience, both actions were consolidated in the Superior Court.

*Appendix B*

One wonders given the nature of the relief contemplated under the IDEA, what jury question is presented for trial or for determination by the court given the lack of administrative determination to review. The fee shifting provisions under the IDEA, §615(i)(3)(B), 20 U.S.C.A. §1415(i)(3)(B), is not a sufficient basis for the court to circumvent the purpose behind the IDEA to develop an I.E.P. for this child. The only remedy under the IDEA is to develop the appropriate I.E.P. and the courts role under the IDEA is to review the administrative determination. Though the Defendant seeks partial summary judgment with respect to the IDEA interlocutory appeal, there is no basis for the Defendant to win on that issue. The proper remedy would be to remand this matter to the OAL to reach a final determination through the exhaustion of the administrative remedy with the court retaining jurisdiction to review the matter upon final administrative determination. *See Waterman by Waterman v. Markett-Intermediate School District* 539 *F. Supp.* 361, 366-367 (W. D. Mich. 1999). Therefore, the Defendant's motion for partial summary judgment on the IDEA claim in docket number SOM-L-860-01 on the basis that they failed to exhaust their administrative remedies is **DENIED** and the matter is remanded to the OAL for a determination of the appropriate IEP for Plaintiff A.J.G. The court will schedule argument on the appeal of the OAL judge's ruling on the motions. The court retains jurisdiction in this matter until the interlocutory appeal is briefed, argued and decided.

*Appendix B*

Defendant moves for summary judgment on Plaintiff's claims relating to his attendance at Stony Brook School, Somerset School, and the Middle School. Defendant contends that the claims are moot because he no longer attends those schools. It is well established that "controversies which have become moot or academic prior to judicial resolution ordinarily will be dismissed." *Cinque v. New Jersey Dept. of Corrections*, 261 *N.J.Super.* 242 (App. Div. 1993); *citing Oxfeld v. New Jersey Bd. of Educ.*, 68 *N.J.* 301, 303-04 (1975). In this case the claims asserted by Plaintiff are neither moot nor academic. The issue of whether the Stony Brook School, Somerset School, and Middle School were ADA and NJHAL compliant during Plaintiff's attendance is still very much' in controversy, despite the fact that he no longer attends those schools, and this issue must be tried before a jury. Furthermore, even assuming arguendo that these claims were moot, the issues involve "great public important compelling resolution." *Oxfeld, supra at* 303. Also, Plaintiff alleges that he suffered damages while at Stony Brook, Somerset, and the Middle School stemming from their alleged non-compliance. Certainly, the damages alleged to have been suffered are not moot despite the fact that he no longer attends those schools. To determine whether Plaintiff is entitled to damages it must first be determined whether those three schools were in compliance. Thus, Defendant's motion to dismiss Plaintiff's claims regarding the Stony Brook School, Somerset School, and Middle School is **DENIED**.

## APPENDIX C — ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION FILED JULY 15, 2008

**SUPREME COURT OF NEW JERSEY**
C-1175 September Term 2007
62,649

D.G., GUARDIAN AD LITEM FOR J.G., A MINOR,

Plaintiff-Petitioner,

v.

NORTH PLAINFIELD BOARD OF EDUCATION, et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3988-05 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 11th day of July, 2008.

s/ Stephen Townsend
Stephen Townsend
CLERK OF THE SUPREME COURT

## APPENDIX D — TRANSCRIPT OF PROCEEDINGS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, CIVIL PART, SOMERSET COUNTY DATED MARCH 17, 2006

**SUPERIOR COURT OF NEW JERSEY**
**LAW DIVISION - CIVIL PART**
**SOMERSET COUNTY**
DOCKET NO. L-990-01
A.D. #A-3988-05T5

DENISE GARGANO, GUARDIAN AD LITEM FOR JG, A MINOR,

Plaintiff,

-VS-

NORTH PLAINFIELD BOARD OF EDUCATION, RICHARD GRECO, DIRECTOR OF PUPIL SERVICES, JANE DELANEY, SUPERVISOR SPECIAL EDUCATION, and MARILYN BIRNBAUM, SUPERINTENDENT,

Defendants.

STENOGRAPHIC TRANSCRIPT
OF MOTION FOR NEW TRIAL

PLACE: Hunterdon County Justice Center
65 Park Avenue
Flemington, New Jersey 08822

DATE: March 17, 2006

*Appendix D*

BEFORE:

THE HONORABLE PETER A. BUCHSBAUM, J.S.C

* * *

[32] THE COURT: Miss Gargano?

All right. This is a motion for new trial pursuant to Rule 4:49-1. The basic standard is that the Court has to be convinced that the verdict is so contrary to the evidence that there was a miscarriage of justice.

The Court's aware of the intense nature of this case, that it involves a seven-year period, it involves the life of a young man who despite cerebral palsy has done in some ways remarkably well, in other ways suffers, as anyone would, from — from not having all the full mobility that other people might have.

The Court's confronted with a jury verdict based on detailed questions in which there was six liability questions. Just so we remember where we were, let's just remember what they were.

Has plaintiff proven that the North Plainfield Board of Ed deprived plaintiff of rights under Title Two of the ADA, which is the Division of Services. No, seven nothing.

Did the North Plainfield Board of Ed fail to provide the plaintiff with reasonable accommodations for his

handicap in violation of the NJLAD? Again no, seven nothing.

Did the North Plainfield Board of Ed [33] intentionally discriminate based on handicap? Same.

Did the North Plainfield Board of Ed create a hostile environment for the plaintiff in fifth or sixth grades or both due to his handicap? Again no.

Did the Board of Ed retaliate in sixth grade for exercising his right to seek accommodations?

Both of these two related in some respect to the letter we have discussed. Again no.

And then specifically a question: Do you find that there was intentional or reckless indifference to constitution — to federal constitutional rights due to equal protection of the law with respect to that letter? Again no.

This was not a matter that was submitted to the jury without a great deal of discussion and instruction and — and detail. In fact, everything in this case over seven weeks, 18 trial days was, as Mr. Schmidt said, and as the Court has observed, hotly contested. The adequacy of the bathrooms, whether there was any complaints about them, particularly in the upper grades and through the IEP process or any other process.

*Appendix D*

There were debates about the provision in the adaptive education and its timeliness, the provision with some reluctance by the town of the [34] conductive therapy with respect to OT and PT, and whether that was an accommodation.

The hiring of aides was another contested matter.

There was dispute over the extent to which Mr. Beckford was qualified. There is no dispute that he was brought in initially because the plaintiffs wanted a male aid.

There was some dispute over the qualifications and abilities of Miss Ciufo. Quite frankly, plaintiff's testimony that she didn't recommend Miss Ciufo under the circumstances the jury could certainly find not credible because Miss Ciufo was living with her.

At the end then the final aide is Rose Gargano, whose plaintiff's — infant Plaintiff's grandmother.

There is also testimony with respect to the conductive educator, Miss Nagy, if I have that name from my recollection correct as to how she pronounced her name, and her lack of complaints even though she was the one who saw Josh most frequently.

There are also debates with respect to the bathrooms, as to whether — what extent these items really effected the plaintiff. A couple of the items [35] that the expert talked about in upper grades were lack of tampon dispensers, which obviously had had no impact on this particular individual.

The issue with respect to a key, there was no — the Court remembers no specific testimony one way or another as to young Mr. Gargano not having a key. So if there was a violation, again what — the debate was did it actually effect him.

There was testimony about the approval of — the local approval of the lift, and whether it did or didn't get approved, and there was disputed testimony about the — about the timing. The Court can question why it took apparently six weeks to initially respond to the reports of the broken lift, but there was also testimony that when the — when the Board did respond, it held an emergency session and grant and did an emergency resolution for procurement in mid-summer, and the jury could have taken that into account.

There was testimony that the stall sizes were not out of compliance. And as I think Mr. Simons pointed out, the testimony about the weight of the chair was not — in the Court's recollection of the evidence was not conclusive in terms of whether that current lift is still even improper.

So too with respect to the testimony [36] concerning the physical facilities, there was a great deal of debate.

With respect to the testimony concerning the aides, there was a great deal of debate.

Just going further on to — on to the up chuck incident. Yes, there was testimony from Mr. Gargano

that he was — this was poured on his head, and from Mrs. Gargano that she observed this chemical on his head. There was also testimony from Mr. Beckford that he didn't do that, and testimony from other officials that whatever might have been done, it did not involve pouring anything on his head, it was just all part of an effort to clean up the chair, and did not involve any danger or injury to Mr. — young Mr. Gargano.

There was also a lack of complaint by Ms. Nagy or the grandmother before Joshua Gargano got home that day, which means that the actual importance of this incident and what exactly it shows about the character of the school and its response is not a matter without its gradations of truth. The jury could have made one finding or another on that. It certainly would not have — I would be talking, making the same comment if the jury had found that was evidence of discrimination. But they did not. And they were [37] entitled to view the various pieces of evidence on that particular incident as they did.

The Court can without — I mean, there are also occasionally — I remember there were issues of credibility in this case, who are you going to believe. And the Court will state for the record that the response of both Joshua Gargano and Mrs. Gargano on cross tended to be monosyllabic. There was in the Court's view a great difference in the way they responded to questions in direct, with a great deal of animation, and frequent "I don't knows" or "I don't remembers" on cross. Particularly I remember when Josh Gargano

didn't remember his ninth or tenth grade grades, and the young man as smart as he is, the jury could of found that — that some of the incidents were not as severe as he might have posed them. As brilliant as he was, and wonderful and dynamic as he was in parts of his testimony, the jury was not obliged to believe every piece of it. And the same thing with Mrs. Gargano.

This issue about the weight of the chair, as I said again, was in conflict.

There was also a great deal of testimony about the summer camp which the town apparently provided after some urging. It is hard to say that the [38] evidence with respect to anything dealing with summer camp clearly required the jury to find discrimination.

All right. We next come to the meaning of that 9-15 letter which was explored in a couple of the questions. That was a serious piece of evidence in favor of the plaintiff. No doubt about it. Viewed in isolation, basically says: Stay out of our school. But that's not what happened that day. There was in fact a meeting going on, there was in fact an aide there, Miss Ciufo as I recall, ready to — to deal with the plaintiff. And in fact the plaintiff Mr. Gargano was allowed in later in the day and began — began a course of instruction that day.

The jury was entitled to believe that there was some kind of miscommunication or some kind of direction that was involved in that letter going out at the time it did with respect to the — with respect to what counsel

thought his obligations were to the administrative law judge. The question isn't whether I believe that, the question is could the jury believe that. And there is enough evidence both ways with respect to that particular letter and what actually happened on September eighteenth of that year, 2001, that could — which would enable a jury to find that that letter itself was not clear evidence of [39] discrimination either intentionally, or in effect that it was just an unfortunate piece of correspondence which was not necessarily reflective of what the District intended to do, and was in fact doing on the eighteenth.

The Court was also, in addition, entitled to consider the circumstances of the demonstration. Mrs. Gargano testified that she had nothing to do with it being a demonstration. Clearly there was other testimony that that was an entirely organized affair. And how the jury might have reacted to the credibility of those two different versions of the demonstration's origin and how it bore on the September fifteenth letter and its effect, versus how the plaintiff — the defendants' view of what was going on that day is again a question about which this court can only speculate but obviously had to leave to the jury to determine.

There were also — there was also — one of the documents submitted talked about the — there was also in the record the certification that Richard Greco prepared and Jane Delaney. These are Exhibits B and C to Mr. Flaum's papers. Excuse me, A, B — and B. The fact that the Board sought legal instruction with

respect to getting additional evaluations does not itself necessarily prove discrimination to the point [40] where the jury had to find — again even — even by itself or in combination with everything else that this was significant evidence that added significant weight to the discrimination. I am not trying to imply that each piece of evidence has to stand on its own, that each piece of evidence needs to prove discrimination, obviously that is not the case, the jury was entitled to look at the cumulative total of the evidence. But in this particular situation the jury could find that simply requesting an administrative law judge to do something is not significant evidence of discrimination, doesn't add to the calculus one way or the other.

Again, the issue is not what this court would have found were this case tried without a jury, but what the Court could have found.

Similarly, with respect to the policy, which is Exhibit D, to be sure it doesn't mention reasonable accommodation, but there was also testimony about training on reasonable accommodation. And again, you have a conflict, do we look at the policy only or do we look at all the evidence. Do we look at the evidence of — of Joshua going to Hawthorne and other places for physical education, do we look at the computers over time he got. If we are looking at [41] all — the entire picture, we have a very mixed picture.

The Court struggled with this motion, obviously struggled with the trial. I won't project what the Court's

vote as a juror would have been. But that's again not the issue.

Every one of the items mentioned by Mr. Flaum, Ms. Gargano — and I respect the passion and the intelligence you brought to this case, but every one of those issues was the subject of a great deal of — of cross testimony, countervailing facts.

And the final thing I want to mention is for better, for worse, this case was tried involving — because of the clarity part of it going to the Office of Administrative Law and sitting there, this case was tried with respect to events that occurred over a seven-year period. The jury had an enormous amount to consider. Had this discrimination been limited to one or two items, I can't speculate now as to what might have happened, but the jury was being asked to make findings in general as to an entire pattern of discrimination and a claimed reasonable accommodation with respect to a whole group of grades. That it found overall there was no discrimination, that the plaintiff had not to their, the jury members' satisfaction, [42] proved their case.

It is not a verdict under these circumstances that the Court views as so clearly infected by passion, by misunderstanding, of the evidence by mistake that the Court can in good conscience order a new trial in this matter.

So with all due respect, which is a phrase I hate to hear from counsel, and I am sorry I just rendered it to you both, the motion is going to be denied.

I have the order. We will simply stamp it denied.

I will provide you with a copy of the order momentarily if you would like to wait.

And the Court is in recess.

This order says January, I notice. It's been that long.

Okay. Counsel, I think you could wait in the courtroom because the next item is in chambers, so there is no reason that you need to move. We will just have copies of the order made.

MR. FLAUM: Thank you, your Honor.

MS. FRANCINE GARGANO: Thank you, your Honor.

MS. CORNELL: Thank you, Judge.

[43] (At which time the matter was concluded.)

## APPENDIX E — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUNTERDON COUNTY, CIVIL DIVISION FILED DECEMBER 20, 2005

Order of Disposition Filed: December 20, 2005

**SUPERIOR COURT OF NEW JERSEY**
**LAW DIVISION**
**HUNTERDON COUNTY CIVIL DIVISION**
**65 PARK AVENUE, FLEMINGTON, NJ 08822**
**(908) 237-5820, TDD (908) 788-1255**

CIVIL ACTION
ORDER OF DISPOSITION
DOCKET NO. SOM-L-990-01

Gargano

PLAINTIFF(S)

v.

North Plainfield Board of Education, et als.

DEFENDANT(S)

It is on this 19 day of December 2005, **ORDERED** that this matter is hereby disposed due to the following:

☑ 05 Tried to completition w/Jury

*Appendix E*

It is further ORDERED that the plaintiff shall serve a copy of this ORDER on the defendant within ten (10) days of the above date.

COMMENTS: Verdict for defendant

s/ Peter A. Buchsbaum
PETER A. BUCHSBAUM, J.S.C.